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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOEL SHIFFRIN, ET AL., PETITIONERS

v.

EARL BRATTON, ET AL.

FIRST NATIONAL BANK OF HIGHLAND PARK, PETITIONER

v.

ROGER CHAPMAN AND JEANNE CHAPMAN, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

I

QUESTION PRESENTED

Whether Congress intended to confer a private right of action upon individuals who have sustained injuries as a result of a violation of the regulations implementing 49 U.S.C. 1371(n)(2).[1]

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[1] In conformity with the petition, the brief in opposition and the decisions below, this brief uses the statutory and regulatory citations that were in effect when this suit was filed. 49 U.S.C. 1371(n)(2) and 14 C.F.R. 378.16 (1977). However, both the statute and its implementing regulations were amended in 1978. See 49 U.S.C. (Supp. III) 1371(q)(2); see also 14 C.F.R. 380.34 (1978).

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STATUTE INVOLVED

49 U.S.C. 1371(n)(2) provides:

> In order to protect travelers and shippers by aircraft operated by supplemental air carriers, the Board may require any supplemental air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such supplemental air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

STATEMENT

1. In 1962, Congress enacted 49 U.S.C. 1371(n)(2) for the express purpose of "protect[ing] travelers and shippers by aircraft operated by supplemental air carriers." Supplemental air carriers include charter airlines and charter tour operators. 49 U.S.C. 1301(3), (35), (36). Section 1371(n)(2) specifically authorizes the Civil Aeronautics Board to require any such carrier "to file a performance bond or equivalent security arrangement" that will assure its customers "appropriate compensation" in the event of a failure to provide transportation in accordance with the charter agreement. At the time of this enactment, as now, the federal district courts had "original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States." 28 U.S.C. 1352.

In 1978, Congress extended the protections of the former Section 1371 (n) (2) to travelers and shippers on scheduled airlines. 49 U.S.C. (Supp. III) 1371(q)(2). Thus, Congress expanded the CAB's authority to re-

quire all certificated air carriers to post performance bonds or make equivalent security arrangements that will protect their customers from financial losses if they fail to provide expected transportation services. S. Rep. No. 95-631, 95th Cong., 2d Sess. 97 (1978). This expansion of the consumer protection provisions of Section 1371(n)(2) took place within the context of the Airline Deregulation Act of 1978, 49 U.S.C. (Supp. III) 1301 *et seq.*, a statute that provides for the complete dismantlement of the CAB by January 1, 1985. 49 U.S.C. (Supp. III) 1551(a) and (b).

2. The CAB responded to the 1962 enactment by promulgating detailed regulations. 14 C.F.R. 378.16 (1977). These regulations gave tour operators the option of posting a bond or providing a combination of a bond and an escrow account. If the tour operator chose the latter option, it was required to make arrangements with a depository bank, and the bank would have to agree to comply with the CAB's regulations governing the management of escrow accounts established for the protection of the prospective travelers.

Petitioners are the First National Bank of Highland Park and its Vice-President, Joel Shiffrin. They entered into agreements with a charter tour operator that bound them to administer escrow accounts in accordance with the CAB's regulations (Pet. App. A3-A4, A18). They also agreed to provide the tour operator with a trust agreement which the Board permitted to be used in lieu of the bond normally required by its regulations. Respondents are travelers who paid in advance for charter flights conducted by the tour operator. When the tour operator was adjudicated a bankrupt, respondents asked the bank to refund their money. The bank was unable to do so because respondents' claims total more than $740,000, and the bank has only about $391,000 in the escrow accounts

(*id.* at A21). Respondents claim that the shortfall is due to the bank's failure to comply with the CAB's regulations (*id.* at A3, A21).

3. Respondents brought suit in the United States District Court for the Northern District of Illinois. The district court dismissed the action, holding that 49 U.S.C. 1371(n)(2) does not contain an implied private right of action (Pet. App. A1–A16; 440 F. Supp. 1257). The court of appeals reversed (Pet. App. A16–A34; 585 F.2d 223). This Court granted the petition for a writ of certiorari, vacated the decision of the court of appeals and remanded the case for further consideration in light of *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). *Shiffrin* v. *Bratton*, 443 U.S. 903 (1979). On remand, the court of appeals carefully considered its decision in light of *Touche Ross* and concluded that respondents are entitled to maintain this suit (Pet. App. A37–A52).

ARGUMENT

Further review of petitioners' claims is unwarranted because the issue presented is of limited prospective importance. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals.[2]

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[2] Petitioners erroneously assert (Pet. 18) that the decision below conflicts with *Wolf* v. *Trans World Airlines, Inc.*, 544 F.2d 134 (3d Cir. 1976), cert. denied, 430 U.S. 915 (1977); *Rauch* v. *United Instruments, Inc.*, 548 F.2d 452 (3d Cir. 1976); and *Polansky* v. *Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975). All of these decisions construed statutes other than 49 U.S.C. 1371(n)(2). The fact that other provisions of the Federal Aviation Act of 1958 have been found not to contain an implied private right of action sheds no light on the issue presented in the instant case and creates no conflict with the decision below.

1. The Airline Deregulation Act of 1978 will eliminate the Civil Aeronautics Board by January 1, 1985. 49 U.S.C. (Supp. III) 1551(a) and (b). Under the Act, some of the regulatory functions of the CAB will simply cease. Other functions will be transferred to different agencies.

The Act does not provide for the termination of regulatory activities under 49 U.S.C. 1371(n)(2). Indeed, Congress amended and strengthened that provision in the very course of passing the deregulation legislation. 49 U.S.C. (Supp. III) 1371(q)(2). However, the fact that the Deregulation Act does not designate an agency to administer the statute after 1985 suggests that, unless Congress acts to transfer the CAB's regulatory functions under Section 1371(n)(2) to another agency, the regulations promulgated pursuant to this statute may cease to have effect when the CAB ceases to exist. Cf. 5 U.S.C. 553(e). The precise issue raised by this case may therefore never recur.

2. This case is of limited importance for another reason. Only suits involving "equivalent security arrangements" executed under Section 1371(n)(2) are affected by the decision below. The CAB's records reflect that the great majority (three out of four) of tour operators post performance bonds. Suits on these bonds may be brought in federal court under 28 U.S.C. 1352. Hence, the court of appeals' decision is unlikely to have a substantial impact in this area.

3. In any event, the court of appeals properly applied this Court's decisions and correctly concluded that Section 1371(n)(2) contains an implied private remedy for persons harmed by a tour operator or depository bank's failure to comply with the statute and its implementing regulations. The question whether a private right of action should be implied turns on a determination of legislative intent, as evidenced by the

statutory language and other traditional indicia. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15–16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). The plain language of Section 1371(n)(2), its legislative history and the events surrounding its passage all suggest that Congress did intend to confer a private right of action upon the respondents in this case.

a. Congress passed Section 1371(n)(2) "[i]n order to protect travelers and shippers by aircraft." 49 U.S.C. 1371(n)(2). To that end, it required the supplemental air carriers "to file a performance bond or equivalent security arrangement" that would guarantee "appropriate compensation to such travelers and shippers" in the event of a failure to provide transportation in accordance with the charter agreements. The statute was plainly designed to benefit a particular group of people—travelers and shippers—by requiring charter tour operators to obtain a surety to guarantee their performance. One of the normal legal incidents of a surety agreement is its enforcement by means of a private lawsuit. Indeed, a surety agreement that cannot be enforced in court is virtually worthless. Congress must therefore have intended that litigation to enforce the surety agreements would occur. Cf. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 18–19.

b. The legislative history of Section 1371(n)(2) is somewhat sparse. However, the Administrator of the Federal Aviation Administration offered the following testimony in support of a bonding requirement:

> There has [*sic*] been several uphappy incidents where supplemental air carriers have not carried out their contracts of transportation with members of the public principally because of financial

> difficulties. This has resulted in great inconvenience and much irritation among the persons affected. By requiring a supplemental air carrier to furnish a performance bond, a desirable, objective review of the carrier's financial responsibility will have to be made—and incidentally outside of the Government— and *when the bond is issued some recourse will have been supplied to those who are otherwise helpless.*

Testimony of N. E. Halaby, *Regulation of Supplemental Air Carriers: Hearing Before the Aviation Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess. 34–35 (1962) (emphasis supplied). Since Mr. Halaby assisted in drafting the provision that ultimately became Section 1371(n)(2), his views as to its purposes and effects are entitled to some weight. See 2A J. Sutherland, *Statutes and Statutory Construction* 210 (4th ed. C. Sands 1973).

c. The legislative context in which Section 1371(n)(2) appears provides strong support for the decision below. When Congress enacted Section 1371(n)(2), a pre-existing statute gave the federal courts "original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States." 28 U.S.C. 1352. The question whether Section 1371(n)(2) contains an implied private right of action is therefore only significant to travelers whose tour operator has chosen to provide an "equivalent security arrangement." Those whose tour operator has chosen to post a performance bond have always been able to sue in federal court. Since Congress is presumed to know the law and since it would be irrational to provide identically situated travelers with different avenues of recourse, it follows that Congress intended that all beneficiaries of Section 1371(n)(2) would be able to sue in federal court. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 696–698.

In addition, as mentioned earlier, Congress strengthened and expanded Section 1371(n)(2) in the context of the Airline Deregulation Act of 1978. 49 U.S.C. (Supp. III) 1371(q)(2). If petitioners are correct that the only method of enforcing the statute and its implementing regulations is through administrative action, it made no sense for Congress to increase the statute's coverage in one section of the Deregulation Act while denying travelers their only avenue of relief by eliminating the CAB in another section of the Act.

4. Petitioners' reliance (Pet. 13–15) upon 49 U.S.C. 1487(a) and the doctrine of *expressio unius est exclusio alterius* is misplaced. This Court has recently observed that "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 711. Section 1487(a) and Section 1371(n)(2) were not enacted contemporaneously.[3] They appear in entirely different sections of the Federal Aviation Act of 1958. They deal with entirely different concerns. Section 1487(a) entitles private litigants to sue an airline for providing transportation without a license. Section 1371(n)(2) protects travelers and shippers from losses caused by licensed but financially irresponsible charter tour operators. There is simply no reason to treat either statute as a gloss upon the other. Compare *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 571–574.

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[3] Section 1371(n)(2) was enacted in 1962; Section 1487(a) was enacted in 1938.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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